Doing Business In Guatemala: The 2008 Country Commercial Guide for U.S. Companies

Chapter 6: Investment Climate

Openness to Foreign Investment Return to top

The 2004-2008 pro-business administration of President Oscar Berger made promotion of foreign investment (FDI) and competitiveness a priority and implemented a series of reforms to improve transparency, combat corruption, and spur economic growth. In January 2008, Alvaro Colom of the National Union for Hope (UNE) party took office. President Colom has pledged to continue to promote foreign investment, enhance competitiveness, and expand investment in the export and tourist sectors.

Guatemalan efforts to improve competitiveness and the investment climate have been recognized by the World Bank's Doing Business Report, the Global Competitiveness Index, and foreign investors. The Doing Business Report placed Guatemala in the list of reformers in 2006 and 2007. According to data from the Guatemalan Central Bank (Banguat), the flow of foreign direct investment (FDI) in 2005 totaled USD 226.8 million, increased by 56 percent in 2006 to USD 353.8 million, and preliminary data indicates that FDI reached USD 535 million in 2007.

Hundreds of U.S. and other foreign firms have active investments in Guatemala.

Guatemala passed a foreign investment law in 1998 to streamline and facilitate foreign investment. The U.S. - Central American Free Trade Agreement (CAFTA-DR) entered into force in Guatemala on July 1, 2006. As part of the CAFTA-DR implementation process, the Guatemalan Congress approved a law that included amendments to the existing intellectual property rights protection (IPR), government procurement, commerce, insurance, arbitration, and telecom laws and to the penal code to ensure compliance with CAFTA-DR. A new e-commerce law and further reform to insurance regulations are pending in Guatemala's Congress, and if approved, will further enhance market access for U.S. companies.

CAFTA-DR established a more secure and predictable legal framework for U.S. investors operating in Guatemala. Under CAFTA-DR, all forms of investment are protected, including enterprises, debt, concessions, contracts and intellectual property. U.S. investors enjoy, in almost all circumstances, the right to establish, acquire and operate investments in Guatemala on an equal footing with local investors.

There are no impediments to the formation of joint ventures or the purchase of local companies by foreign investors. The absence of an equities market in which shares of publicly owned firms are traded makes takeovers difficult. Most foreign firms therefore operate through locally incorporated subsidiaries.

There are no restrictions on foreign investment in the telecommunications, electrical power generation, airline, or ground transportation sectors. The GOG privatized a number of state-owned assets in industries in the late nineties including: power generation and distribution, telephone, and grain storage. The Foreign Investment Law removed limitations to foreign ownership in domestic airlines and ground transport companies in January 2004.

Foreign banks may open branches or subsidiaries in Guatemala subject to Guatemalan financial controls and regulations. These include a rule requiring local subsidiaries of foreign banks and financial institutions operating in Guatemala to meet Guatemalan capital and lending requirements as if they were stand-alone operations.

Some professional services may only be supplied by professionals with locally recognized academic credentials. Public notaries must be Guatemalan nationals. Foreign enterprises may provide licensed professional services in Guatemala through a contract or other relationship with a Guatemalan company. An insurance law is currently pending in the Guatemalan Congress that would allow foreign insurance companies to open branches in Guatemala, a requirement under CAFTA-DR that must be in place by 2009.

Mining has historically been a sensitive issue in Guatemala and operations in Guatemala have been subject to protests. Subsurface minerals and petroleum are the property of the state. Contracts for development are typically granted through production-sharing agreements. New legislation resulted in a more transparent contracting process, although the suspension in 2002 of a hydrocarbon exploration contract on environmental grounds, and without due process, raised some concerns among investors. Complex and confusing laws and regulations, inconsistent judicial decisions, bureaucratic impediments, and corruption continue to constitute practical barriers to investment.

Domestic and foreign firms must publish their intent to conduct business, agree to Guatemalan legal jurisdiction, and register with the Ministry of Economy in order to incorporate formally in Guatemala. Foreign firms are subject to additional, time-consuming requirements, including: demonstrating solvency, depositing operating capital in a local bank, supplying financial statements, contractually agreeing to fulfill all legal obligations before leaving the country, and appointing a Guatemalan citizen or foreign resident (with work permit) as legal representative. The requirements are not used specifically to screen or discriminate against foreign companies, but the procedures can serve as a disincentive to investment.

Conversion and Transfer Policies Return to top

The right to hold private property and to engage in business activities is specifically recognized by the Guatemalan Constitution. Foreign private entities can establish, acquire and dispose freely of virtually any type of business interest, with the exception of insurance and professional services as noted above in Openness to Foreign Investment. Guatemala's foreign investment law and CAFTA-DR commitments protect the investor's right to remit profits and repatriate capital. There are no restrictions on converting or transferring funds associated with an investment (or any other licit activity) into a freely usable currency at a market-clearing rate. U.S. dollars are freely available and easy to obtain within the Guatemalan banking system. There are no legal constraints on the quantity of remittances or any other capital flows, and there have been no reports of unusual delays in the remittance of investment returns.

The Law of Free Negotiation of Currencies allows Guatemalan banks to offer different types of foreign currency-denominated accounts. In practice, the dollar is used most frequently. Some banks offer "pay through" dollar-denominated accounts in which depositors make deposits and withdrawals at a local bank while the actual account is maintained on behalf of depositors in an offshore bank.

Capital can be transferred from Guatemala to any other jurisdiction without restriction. Guatemalan firms have been active investors in Central America, the Dominican Republic, and South Florida.

Expropriation and Compensation Return to top

The Constitution prohibits expropriation, except in cases of eminent domain, national interest, or social benefit. The foreign investment law requires advance compensation in cases of expropriation. Investor rights are protected under CAFTA-DR by an impartial procedure for dispute settlement that is fully transparent and open to the public. Submissions to dispute panels and dispute panel hearings are open to the public, and interested parties have the opportunity to submit their views.

In June 2007, a U.S. company operating in Guatemala filed a claim under Chapter 10 of CAFTA-DR against the Government of Guatemala with the International Centre for Settlement of Investment Disputes (ICSID). The claimant alleged the Government of Guatemala indirectly expropriated the company's assets by negating a contract. The company requested USD 65 million in compensation and damages from the Guatemalan Government. The case remains pending.

Dispute Settlement Return to top

Resolution of business and investment disputes through Guatemala's judicial system is time-consuming, and civil cases can take several years to resolve. Corruption, intimidation and ineffectiveness in the judiciary have led to confusing and contradictory decisions and frequent delays. U.S. companies, however, face the same conditions as local companies and are not subject to any pattern of discrimination in the legal system.

Guatemala has a written and consistently applied commercial law (Codigo de Comercio). Guatemala does not have an independent bankruptcy law, but the Code on Civil and Mercantile Legal Proceedings (Codigo Procesal Civil y Mercantil) contains a specific chapter on bankruptcy proceedings. Under the code, creditors can request to be included in the list of creditors, request an insolvency proceeding when a debtor has suspended payments of liabilities to creditors, and constitute a general board of creditors to be informed of the proceedings against the debtor.

The Government of Guatemala has signed the United Nations Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention), the Interamerican Convention on International Commercial Arbitration (Panama Convention), and the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID). Guatemala's foreign investment law also permits international arbitration or alternative resolution of disputes, if agreed to by the parties.

Guatemalan procedures for enforcing agreements are similar to those of the United States. Guatemala's Arbitration Law of 1995 is based on the UNCITRAL Model Law for International Commercial Arbitration and regulations are in line with the New York Convention. Default awards and arbitral agreements are fully enforceable in Guatemala. In addition, CAFTA-DR added an additional dispute resolution mechanism for investors. The first claim under that system was filed in June 2007 and the Government of Guatemala has followed all procedures required of it under the process.

Performance Requirements and Incentives Return to top

Guatemala's 1998 Foreign Investment Law eliminated trade-related investment restrictions and ensured Guatemala was compliant with WTO obligations under the Agreement on Trade Related Investment Measures (TRIMS). In 1999, Guatemala notified the WTO that it was TRIMS compliant. Guatemala does not impose performance, purchase or export requirements other than those normally associated with free trade zones and duty drawback programs. Companies are not required to locate operations in specific geographic areas or include local content in production.

Investment incentives are specified in law and are available, with few exceptions, to both foreign and Guatemalan investors without discrimination. There are two main programs, one focused on garment exports and the other on reforestation.

The major Guatemalan incentive program, the Law for the Promotion and Development of Export Activities and Drawback, is aimed mainly at "maquiladoras" – mostly garment manufacturing and assembly operations in which over half of production inputs/components are imported and the completed products are exported. Investors in this sector are granted a 10-year exemption from both income taxes and the Temporary and Extraordinary Tax to Support the Peace Agreements (IETAAP), Guatemala's alternative minimum tax. Additional incentives include an exemption of duties and value-added taxes on imported machinery, a one-year suspension (extendable to a second year) of the same duties and taxes on imports of production inputs and packing material, and a waiver of duties on final goods that are exported. The waiver for customs duties and income taxes was scheduled to expire on December 31, 2009; however, in July 2007, the WTO approved an extension for Guatemala through 2015.

Property owners who engage in reforestation activities may qualify for government incentives through the National Institute of Forests (INAB). This incentive program is scheduled to end in 2017.

Guatemalan law requires that food products sold in the domestic market be tested, registered and labeled in Spanish, although stick-on labels are permitted.

Under CAFTA-DR, about 80 percent of U.S. industrial and consumer goods now enter Guatemala duty-free, with the remaining tariffs scheduled to be phased-out by 2015. Nearly all textile and apparel goods that meet the agreement's rules of origin are now traded duty-free and quota-free, promoting new opportunities for U.S. and regional fiber, yarn, fabric and apparel manufacturing. The agreement's tariff treatment for textile and apparel goods is retroactive to January 1, 2004.

Under CAFTA-DR, more than half of U.S. agricultural exports now enter Guatemala duty-free. Guatemala will eliminate its remaining tariffs on nearly all agricultural products by 2020 (2023 for rice and chicken leg quarters and 2025 for dairy products). For the most sensitive products, tariff rate quotas will permit some immediate duty-free access for specified quantities during the tariff phase-out period, with the duty-free amount expanding during that period.

Right to Private Ownership and Establishment

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The right to hold private property and to engage in business activity is recognized in the Guatemalan Constitution. The foreign investment law specifically notes that foreign investors enjoy the same rights of use, benefit, and ownership of property as afforded Guatemalans. Foreigners are prohibited, however, from owning land immediately adjacent to rivers, oceans and international borders.

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There are no impediments to the formation of joint ventures or the purchase of local companies by foreign investors. The absence of an equities market in which shares of publicly owned firms are traded makes takeovers difficult. Most foreign firms therefore operate through locally incorporated subsidiaries.

Protection of Property Rights

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Guatemala has a registry for both real property and intellectual property. Inadequately documented titles and gaps in the public record can sometimes lead to conflicting claims of land ownership. The government has stepped up its efforts to enforce property rights where title is clear or where title disputes have been resolved; however, it can be difficult to obtain and enforce eviction notices.

Mortgages are available to finance homes and businesses, but only a small number of banks offer 15-year mortgage loans for residential real estate.

The legal system is accessible to foreigners and does not systemically discriminate against foreign firms. However, in practice, it favors local attorneys accustomed to maneuvering a case through the process. Foreign investors are advised to seek reliable local counsel early in the investment process.

Regarding intellectual property rights (IPR), Guatemala belongs to the World Trade Organization (WTO) and the World Intellectual Property Organization (WIPO). It is also a signatory to the Paris Convention, Bern Convention, Rome Convention, Phonograms Convention, and the Nairobi Treaty. Guatemala has ratified the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). In June 2006, as part of CAFTA-DR implementation, Guatemala ratified the Patent Cooperation Treaty and the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure. Also in June 2006, the Guatemalan Congress approved the International Convention for the Protection of New Varieties of Plants (UPOV Convention); however, implementing legislation must be approved in order for Guatemala to become a party to the convention.

The Guatemalan Congress passed legislation in August 2000 to bring the country's intellectual property rights laws into compliance with the WTO's TRIPS agreement. This legislation was modified in 2003 to provide pharmaceutical test data protection consistent with international practice and in 2005 the law was again amended to comply with IPR protection requirements in CAFTA-DR. CAFTA-DR provides for improved standards for the protection and enforcement of a broad range of intellectual property rights, which are consistent with U.S. standards of protection and enforcement as well as emerging international standards. Enforcement of IPR laws, however, has been inconsistent. A number of raids, cases and prosecutions have been pursued; however, resource constraints and lack of coordinated government action impede efficient enforcement efforts. Piracy of works protected by copyright and infringement of other forms of intellectual property, such as trademarks, remains problematic in Guatemala.

Transparency of Regulatory System Return to top

Tax, labor, environment, health and safety laws do not directly impede investment in Guatemala. Bureaucratic hurdles are common for both domestic and foreign companies, including lengthy processes to open and close a business, obtain permits and licenses, and receive shipments. The legal and regulatory systems are confusing and not transparent. Regulations often contain few explicit criteria for government administrators, resulting in ambiguous requirements that are applied inconsistently by different government agencies and the courts.

Public participation in the promulgation of regulations is rare, although companies and individuals are able to submit comments to the issuing government office with limited effect. There is no consistent legislative oversight of administrative rule making.

Efficient Capital Markets and Portfolio Investment Return to top

Guatemala's capital markets are weak and inefficient. There are two principal commercial exchanges that deal almost exclusively in commercial paper and government bonds. Foreign investors are reported to be large holders of Guatemalan government debt. There is no market in publicly traded equities, the absence of which raises the cost of capital and complicates mergers and acquisitions. As of November 2007, borrowers faced a weighed average nominal interest rate of 13.3 percent with some banks charging up to 57 and 75 percent. Foreigners rarely rely on the local credit market to finance investments.

In April 2002, the Guatemalan Congress passed a package of financial sector regulatory reforms that increased the regulatory and supervisory authority of the Superintendent of Banks (SIB), which is responsible for regulating the financial services industry. These reforms brought local practices more in line with international standards and spurred a round of bank consolidation and restructuring. The pending insurance law mentioned earlier will also strengthen supervision of the insurance sector.

The 2002 reforms required that non-performing assets held offshore be included in loan loss provision and capital adequacy ratios. This forced a number of smaller banks to seek new capital, buyers, or mergers with stronger banks. From October 2006 to August 2007, six bank mergers/purchases were announced, and four were completed. Further consolidation of the banking system is expected in 2008.

Groups of affiliated credit card, insurance, finance, commercial banking, leasing, and related companies must issue consolidated financial statements prepared in accordance with uniform, generally accepted accounting practices. The groups are audited and supervised on a consolidated basis.

Guatemala's 22 commercial banks had an estimated USD 14.8 billion in assets among them in 2007. The five largest banks control about 77 percent of total assets. In addition, there are about 17 non-bank financial institutions, which perform primarily investment banking and medium and long-term lending, and two exchange houses.

Overall, the banking system remains stable. Two bank failures in 2006 and 2007 were managed effectively and did not affect the financial system or broader economy. In October 2006, the SIB recommended that Guatemala's fourth largest bank, Bancafe, be suspended due to financial problems arising from an off-shore investment of USD 204 million in the bankrupt U.S. commodities brokerage company Refco. As a result, the financial group headed by the suspended bank was dissolved and the license of its off-shore bank was canceled. In January 2007, the license for Banco de Comercio was suspended after the bank requested intervention by the SIB due to its overextended loan portfolio.

Political Violence Return to top

The Guatemalan government and the guerrillas of the Guatemalan National Revolutionary Unity (URNG) signed the Accord for a Firm and Lasting Peace on December 29, 1996, ending the 36-year internal armed conflict. Though there are occasional incidents of violence associated with organized land invasions and protests against mining, political violence has virtually disappeared.

However, common crime, including kidnapping, car-jacking and robberies of banks and armored cars, is a major problem in Guatemala. Security was a major campaign issue in the 2007 presidential election and remains a widespread concern, according to public opinion surveys. Foreigners are not singled out as the targets of crime.

Guatemala has a 140 year-old border dispute with Belize, and territorial sea disputes with Belize and Honduras. It remains committed to resolving these disputes through diplomatic means although ongoing talks with Belize under the auspices of the Organization of American States (OAS) have not achieved significant progress to date. Honduras is participating in the Guatemala-Belize discussions to resolve its maritime dispute with Guatemala.

Corruption [Return to top]

Bribery is illegal under the penal code; however, corruption remains a serious problem that companies may encounter at many levels. Guatemala's score on the Transparency International 2007 Corruption Perceptions Index was 2.8 points out of 10, ranking it 25th out of 32 countries in the region (111th overall).

Guatemala ratified the UN Convention against Corruption in November 2006. Guatemala ratified the Inter-American Convention against corruption in July 2001, but has not implemented all of its provisions, such as criminalizing illicit enrichment. Changes in the law made government officials who benefit from narcotics trafficking activities subject to criminal penalties.

Guatemala enacted measures to reverse the perceived increase in government corruption under the Portillo administration (2000-2003), but progress has been slow. Various senior officials who served during the Portillo administration were investigated and sentenced for their role in corruption scandals including the former Superintendent of Tax Administration, Minister of Interior, Comptroller General, and Minister of Finance.

Investors have historically found corruption especially pervasive in customs transactions, particularly at ports and borders away from the capital. Guatemala became a full party to the WTO Customs Valuation Agreement on August 10, 2004. The Superintendent of Tax Administration (SAT) launched a customs modernization program in November 2006 that implemented an advanced electronic manifest system and removed many corrupt customs officials.

Guatemala's Government Procurement Law requires most government purchases over 900,000 quetzals (approximately USD 118,000) to be submitted for public competitive bidding. Since March 2004, Guatemalan government entities have been required to use Guatecompras, an Internet-based electronic procurement system, which improved transparency in the government procurement process. Although the number of entities using Guatecompras has increased, some government agencies continue to use parallel systems of public procurement (such as spending through international organizations or NGOs) to avoid auditing and public bidding.

Bilateral Investment Agreements [Return to top]

CAFTA-DR contains a chapter on investment similar to a Bilateral Investment Treaty with the U.S. Guatemala has signed bilateral investment agreements with Argentina, Austria, Belgium, Cuba, Chile, Ecuador, Finland, France, Germany, Italy, South Korea, Spain, Sweden, Switzerland, Taiwan, the Czech Republic, and The Netherlands.

In addition to CAFTA-DR, Guatemala has signed bilateral or regional free trade agreements with Chile, Mexico, the Dominican Republic, Colombia, and Taiwan, and is currently negotiating FTA agreements with Canada, Panama, and the European Union.

OPIC and Other Investment Insurance Programs [Return to top]

Guatemala ratified the Multilateral Investment Guarantee Agreement (MIGA) in 1996.

The Overseas Private Investment Corporation (OPIC) is active in Guatemala, providing both insurance and investment financing. OPIC applicants have generally been able to quickly obtain Foreign Government Approval (FGA). For more information on OPIC programs, U.S. investors should contact OPIC headquarters in Washington, D.C. at tel. (202) 336-8799 or go to www.opic.gov.

According to the Central Bank of Guatemala, the exchange rate of Quetzals to the U.S. Dollar in 2007 remained relatively stable with a high of 7.75 and a low of 7.6.

Labor Return to top

An estimated 1.2 million individuals are employed in the formal sector and an estimated three million more work in the informal sector, including those who are too young for formal sector employment. In rural areas in particular, child labor remains a serious problem in certain industries. The availability of a large, unskilled and inexpensive labor force has led many employers, such as construction and agricultural firms, to use labor-intensive production methods. Over a quarter of the overall workforce is illiterate. In developed urban areas, however, education levels are much higher, and a workforce with the skills necessary to staff a growing service sector has emerged. Even so, highly capable technical and managerial workers remain in short supply, with secondary and tertiary education focused on social science careers.

No special laws or exemptions from regular labor laws are provided for the export processing zones. Managers of Guatemalan companies must be either Guatemalan citizens or resident aliens with work permits. Employer responsibilities regarding working conditions, especially health and safety standards, benefits, severance pay, premium pay for overtime work, minimum wages and bonuses, are specified in the labor code. Mandatory benefits, bonuses, and employer contributions to the Social Security system can add up to over 60 percent of an employee's base pay. Many workers, however, especially in agriculture, do not receive the full compensation package mandated in the labor law, and in practice labor rights are not well enforced.

The Constitution guarantees the right of workers to unionize and to strike and commits the state to support and protect collective bargaining as well as respect international labor conventions. Despite these legal guarantees, the rate of unionization in Guatemala remains low. According to Labor Ministry statistics, only 8 percent of the formal sector labor force is unionized

Foreign-Trade Zones/Free Ports Return to top

Guatemalan law permits the establishment of free trade zones (FTZs). As of 2007, thirteen of eighteen authorized FTZs were operational. Commercial activities and apparel assembly operations are the main beneficiaries of Guatemala's free trade and "maquiladora" laws. Investment incentives are specified in law and are available, with few exceptions, to both foreign and Guatemalan investors without discrimination.

Foreign Direct Investment Statistics Return to top

According to data from the Guatemalan Central Bank (Banguat), the flow of foreign direct investment (FDI) in 2005 totaled USD 226.8 million, increased by 56 percent in 2006 to USD 353.8 million, and is projected to reach USD 535 million in 2007. There is no reliable data on stock of FDI. The increase of FDI registered between 2005 and 2007 is attributable to CAFTA-DR's entry into force.

Major U.S. companies, including investors (representative, but not a complete listing):

3M Company
ACS/BPS
American International Group
Ashmore Energy
AT&T Corporation
Bristol Myers Squibb
Cargill
Chevron Corporation
Chiquita Brands International
Citibank
Duke Energy
Exxon Mobil
Federal Express
Frito Lay
Kellogg Company
Kimberly Clark Corp.
Marriott International
Microsoft Corporation
Pepsi-Co Bottling Co.
Pfizer Warner Lambert Co.
Phillip Morris International
Procter & Gamble Co.
Ralston Purina
Sears
Sherwin Williams
Teco Energy
Wal-Mart
Westin Hotels and Suites
Xerox Corporation

Other major foreign investors:

Barcelo Hotel
BD Centroamericana
Bimbo de C.A.
Cindal-Nestle
ELEKTRA
ERICSSON DE GUATEMALA
Shell Oil
Siemens
Telefonica de Espana
Telmex
Union Fenosa

Web Resources

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- Secretariat for Central American Economic Integration: http://www.sieca.org.gt
- Superintendence of Banks: http://www.sib.gob.gt
- Guatemalan Central Bank: http://www.banguat.gob.gt
- Superintendence of Tax Administration: http://www.sat.gob.gt
- Guatemalan Ministry of Economy: http://www.mineco.gob.gt
- Guatemalan Investment Office: http://www.investinguatemala.org
- Guatemalan procurement internet-based system: http://www.guatecompras.gt
- Guatemalan Exporters' Association: http://www.export.com.gt
- Guatemalan Chamber of Commerce: http://www.negociosenguatemala.com
- Guatemalan Chamber of Industry: http://www.industriaguate.com
- Office of the United States Trade Representative: http://www.ustr.gov
- OPIC: http://www.opic.gov

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entering into business ventures or other commercial arrangements. **The Department of Commerce** can assist companies in these endeavors.